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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 LENIN GARCIA,

12 Petitioner,

13 vs.

14
15 GEORGE NEOTTI,

16 Respondent.

CASE NO. 10cv1695-LAB (DHB)

**ORDER OVERRULING
OBJECTIONS TO REPORT AND
RECOMMENDATION;**

**ORDER ADOPTING REPORT
AND RECOMMENDATION; AND**

**ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS**

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18 Petitioner Lenin Garcia filed his petition seeking a writ of habeas corpus pursuant to
19 28 U.S.C. § 2254. This matter was referred to Magistrate Judge Louisa Porter for report and
20 recommendation, pursuant to 28 U.S.C. § 636 and Fed. R. Civ. P. 72. Judge Porter issued
21 her report and recommendation (the "R&R"), to which Garcia has filed written objections.

22 A district court has jurisdiction to review a Magistrate Judge's report and
23 recommendation on dispositive matters. Fed. R. Civ. P. 72(b). "The district judge must
24 determine de novo any part of the magistrate judge's disposition that has been properly
25 objected to." *Id.* The Court reviews de novo those portions of the R&R to which specific
26 written objection is made. *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir.
27 2003) (en banc). "A judge of the court may accept, reject, or modify, in whole or in part, the
28 findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1).

1 The R&R recommends denying the petition because Garcia seeks remedies
2 unavailable through writ of habeas corpus, because he is not challenging the fact or length
3 of his custody. The R&R summarizes Garcia's claim as arising from an allegedly groundless
4 rules violation he received in retaliation for filing complaints against prison staff. He did not
5 suffer a loss of good-time credits as a result of the disciplinary accusation, and the length
6 of his sentence was unaffected by it. The R&R reasons that he is only challenging the
7 conditions of his confinement, so the proper means of bringing his claim is an action
8 pursuant to 42 U.S.C. § 1983.

9 Garcia's objections don't challenge the R&R's characterization of his claim. Rather,
10 he argues that because the state courts where he first brought his claim were willing to treat
11 his claim as one for habeas relief, this Court should do so as well. (See Obj. to R&R (Docket
12 no. 12), 1:24–2:12.) In fact, the state court decisions he attached to his traverse show he
13 is mistaken. The traverse (Docket no. 10) includes a decision by the California Superior
14 Court (Ex. 3 (Dkt. no. 10 at 24–27)) and the last reasoned decision, that of the California
15 Court of appeal. (Ex. 4 (Dkt. no. 10 at 29–45).) Both decisions show that the state courts
16 recognized Garcia thought he was pursuing habeas relief, but in fact there was no right to
17 review for the injuries he claimed, and habeas jurisdiction was lacking. (See Dkt. no 10 at
18 27:13–18; 29.)

19 The R&R, however, does not examine federal habeas jurisdiction closely enough, and
20 the Court will therefore do so now. Under Ninth Circuit precedent, federal courts can
21 exercise habeas jurisdiction where the expungement of a challenged prison disciplinary
22 record is "likely to accelerate the prisoner's eligibility for parole." See *Ramirez v. Galaza*, 334
23 F.3d 850, 858 (9th Cir. 2003); *Bostic v. Carlson*, 884 F.2d 1267 (9th Cir. 1989). Although it is
24 clear Garcia could bring a § 1983 suit for the types of deprivations he alleges here, it does
25 not follow that he could not also vindicate his rights by means of habeas review. See *Docken*
26 *v. Chase*, 393 F.3d 1024, 1027 (9th Cir. 2004) (noting that habeas and § 1983 can be
27 available to remedy the same types of rights violations). For Garcia, the advantage of
28 bringing a § 1983 action would include the ability to bring broader claims and potentially seek

1 broader remedies, not merely expungement. Those remedies not not, however, include
2 immediate or quicker release from confinement; that is available only via habeas review. See
3 *Docken* at 1026–27. A great disadvantage would be that, because the relief he
4 seeks—expungement of a disciplinary finding—necessarily implies the invalidity of that
5 conviction, the “favorable termination” rule of *Heck v. Humphrey*, 512 U.S. 477, 487 (1994)
6 would bar his claim. See *Jackson v. Swarthout*, 2013 WL 4049547, slip op. at *3 (E.D.Cal.,
7 Aug. 7, 2013) (*Heck* bar applies to § 1983 actions seeking expungement of prison
8 disciplinary findings, but not to habeas petitions). In fact, *Heck* contemplates that a
9 complainant will first seek either direct review or habeas review, whichever is appropriate.

10 The Ninth Circuit has not elaborated on the degree of likelihood required for the “likely
11 to accelerate” determination. See *Birdwell v. Martel*, 2012 WL 761914, at *4 and n.2
12 (E.D.Cal., March 7, 2012). The state court determined that although the write-up Garcia
13 received was not itself disciplinary, the implications were potentially serious and it was “likely
14 the Board for Parole Hearings would consider [such a write-up] in reaching a decision on
15 parole.” (Traverse, Ex. 1 (Docket no. 10 at 14–15).) This claim is still at the pleading stage,
16 so the Court will liberally construe this evaluation, together with Garcia’s own allegations,
17 (see Traverse at 10), as adequately pleading “likelihood of acceleration”.¹ In view of this, the
18 Court believes it can exercise jurisdiction over Garcia’s habeas claim, under *Ramirez* and
19 *Bostic*. Because the law is unsettled, however, and because evidence of the likelihood of
20 parole was not provided, the Court recognizes it is open to reasonable argument.

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23 ¹ The Court’s own dockets provide evidence that Petitioner has repeatedly filed
24 § 1983 actions against other prison officials, accusing them of retaliating against him for
25 falsely writing him up. See, e.g., *Garcia et al. v. Smith, et al.*, 10cv1187-AJB (RBB); *Garcia*
26 *v. Smith, et al.*, 10cv2433-JAH (MDD); *Garcia v. Rivera*, 11cv763-MMA (KSC); and *Garcia*
27 *v. Cluck, et al.* 12cv718-AJB (NLS). It is possible Garcia has other write-ups and disciplinary
28 findings against him. If he does, the “likelihood of acceleration” analysis would tilt more
strongly away from jurisdiction. This is especially true if there are other factors that make
parole less likely, such as if Garcia’s conviction or convictions were for serious crimes, and
if he had not served much time following those convictions. See *Nguyen v. Hill*, 2012 WL
5381256, at *2 (E.D.Cal., Oct. 31, 2012) (considering other factors weighing on the likelihood
of parole to determine that disciplinary finding would not speed up petitioner’s release). Of
course at this stage, the Court accepts the pleadings as true.

1 Ordinarily Garcia would be required to exhaust his claims in state court, but here,
2 California's courts found habeas review was unavailable. See 28 U.S.C. § 2254(b)(1)((B)(i)
3 and (ii) (providing that exhaustion of state court remedies is not required where there is an
4 absence of available corrective process, or that process cannot effectively protect the
5 applicant's rights).

6 On the merits, Garcia cannot prevail. His own allegations show he received the
7 procedural protections required under *Wolff v. McDonnell*, 418 U.S. 539 (1974). He claims
8 he was found guilty of this disciplinary violation based on evidence the trier of fact knew to
9 be falsified. He claims the trier of fact was presented with "overwhelming exculpatory
10 evidence which proves that petitioner is innocent of the charges" (Am. Pet., at 6; see *also*
11 *id.*, Appendix ("Summary of the Case," Docket no. 3 at 14–20.)

12 Much of Garcia's "evidence" is in fact just his own arguments, and accusations of
13 retaliation, and the evidence he does cite is not overwhelming or conclusive. He provides
14 documentation showing that he had a pass to be in a classroom on October 22, 2008 from
15 8:50 to 10:00 (Pet., Ex. D), and that he asked for information from the prison log book and
16 found that dayroom release for the his tier on that day was 9:15 to 10:15. The write-up, or
17 chrono, (Pet., Ex. C), says that "at approximately 1000 hours" while Garcia was on dayroom
18 release, Garcia presented Officer Reed with a memo saying he was free to go where he
19 wanted to. The write-up says Garcia could not go out simply because he wanted to; that
20 Garcia had spent half an hour playing cards in the dayroom instead of conducting Men's
21 Advisory Council business as he was supposed to; and that Garcia was "constantly late in
22 locking up and fails to program as the other inmates do" in the same housing unit. (*Id.*) The
23 evidence for motive to retaliate is a grievance Garcia filed against Reed the previous year.

24 The state court reviewed the evidence and found Garcia made out a prima facie case
25 for relief. It determined this because "all, if not portions of the chrono, appear arbitrary,
26 unsupported by any evidence or fact, and/or based solely upon the opinion of the
27 correctional officer." (Traverse, Ex. 1 (Docket no. 10 at 15).) At first blush, this might sound
28 as if Garcia appeared to be clearly innocent. But on further review, it is clear the state court

1 merely questioned whether disciplinary charges could properly be brought on Reed's opinion
2 evidence, whether playing cards was a rules violation, and what the basis for the officer's
3 conclusions about tardiness in locking up and failing to program. In other words, a prima
4 facie case was not the overwhelming case Garcia claims it was.

5 It is important to remember that, because Garcia is seeking habeas relief, his claim
6 is essentially that he was improperly found guilty of a disciplinary violation; it is not a claim
7 against Reed for lying or falsifying evidence. The question, therefore, is whether he was
8 denied due process of law. See *Smith v. Goss*, 2013 WL 4011606, at *9 (E.D.Cal., Aug. 6
9 2013) ("[T]he Due Process clause does not guarantee freedom from false testimony.")

10 Prisoners undergoing disciplinary proceedings are not entitled to all the rights that
11 would normally attach in a criminal prosecution. *Wolff*, 418 U.S. at 556. Rather, they are only
12 entitled to certain minimal protections. *Id.* Garcia's claim doesn't rest on allegations that any
13 of these protections weren't met, and the record suggests they were met. With regard to the
14 claim he focuses on—whether he was convicted on the basis of falsified evidence—it is clear
15 that he was permitted to present his own evidence and put on a defense. He points to that
16 evidence, in fact. When these procedural protections have been met, due process is
17 satisfied. *Walker v. Sumner*, 14 F.3d 1415, 1420 (9th Cir. 1994). Compare *Hanrahan v.*
18 *Lane*, 747 F.2d 1137, 1140–41 (7th Cir. 1984) (when an inmate has been afforded procedural
19 due process in a disciplinary hearing, allegations of false charges fail to state a claim under
20 § 1983).

21 Some Courts in this Circuit have subjected claims such as this to the "actual
22 innocence" standard. See *Napoleon v. Babcock*, 2012 WL 1639881, at *8 (E.D.Cal., May
23 9, 2012). Habeas review does not amount to a *de novo* review by this Court of the evidence,
24 to determine whether the Court would have made the same findings. *Id.* Rather, review is
25 deferential and official proceedings are entitled to a presumption of correctness; the
26 standard is "extremely high." *Id.* (citing *Carriger v. Stewart*, 132 F.3d 463, 476–77 (9th Cir.
27 1997)) (noting that the "actual innocence" standard is extremely high, and does not amount
28 to a trial *de novo*). This standard is not met here.

1 The documentary evidence Garcia cites doesn't show that Reed's accusations were
2 untrue as to material points. Garcia's argument is based on the time of day Reed says he
3 saw Garcia in the dayroom; he claims that his group was released at 9:10 and not at 10:00
4 as claimed. (Pet., Ex. F.) He characterizes this as an alibi. (Traverse at 4 (describing
5 documentation showing he was in the classroom as an alibi).) Garcia also points to
6 evidence Reed wanted to retaliate against him.

7 It isn't clear why Garcia's evidence amounts to a solid alibi. But even accepting his
8 argument as true doesn't mean Reed was intentionally lying, or, more importantly, that the
9 finder of fact was bound to conclude he was. It was a matter for consideration, of course, but
10 Garcia had an opportunity to present his own evidence, and did so. The chrono was written
11 four days after the alleged incident, and describes the time as approximate. The trier of fact
12 could reasonably have concluded that Reed's recollection of the times or dates was
13 somewhat mistaken, without concluding he was lying. Furthermore, a number of the
14 accusations have no particular time frame, and merely accuse Garcia of repeatedly locking
15 up late, and "fail[ing] to program." In its response to the state court's directive to substantiate
16 the disciplinary finding, Respondent's counsel emphasized that the gravamen of the
17 complaint about card-playing was the fact that Garcia was abusing his position on the Men's
18 Advisory Counsel by playing cards when he should have been working, and otherwise
19 abusing his position to further his own needs. (Traverse, Ex. 2 at 3 (Dkt. no. 10 at 20).) The
20 particular time when that took place is not central to the finding.

21 Garcia argues that the disciplinary procedure didn't accord with state law, and that this
22 therefore deprived him of due process. But errors of state law don't form the basis for federal
23 habeas relief. See *Estelle v. McGuire*, 502 U.S. 62, 67 (1991).

24 Garcia identifies other potential claims, such as retaliation, but these have no effect
25 on the duration of his confinement and are not cognizable on habeas review. See, e.g.,
26 *Muhammad v. Close*, 540 U.S. 754–55 (2004) (prisoner who brought a retaliation claim did
27 not raise any claim on which habeas could have been granted). He also identifies claims that
28 are not actionable in this Court at all, such as alleged errors in the state court judgments.

The Court **OVERRULES** Garcia's objections that the Court is bound by state court construction of his claims. Nevertheless, it does appear he has a habeas claim that the Court can exercise jurisdiction over. That portion of the R&R that determined that habeas review was unavailable is **MODIFIED** to include the analysis set forth above. Nevertheless, Garcia's claims fail on the merits, and it appears he cannot cure them by amendment. The petition is **DENIED**.

Although much of this analysis is based on unsettled areas of the law, the Court has resolved those in Garcia's favor. If it should prove that the Court lacks jurisdiction over Garcia's habeas claim, he would still lose. Because the trier of fact could reasonably have believed the evidence against Garcia and made a disciplinary finding against him, and because the standard for reversing such a finding is so extremely high, the Court concludes that jurists of reason would not find the matter debatable. The certificate of appealability is therefore **DENIED**.

IT IS SO ORDERED.

DATED: August 21, 2013

Larry A. Bunker

HONORABLE LARRY ALAN BURNS
United States District Judge